

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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:  
DA SILVA MOORE, :  
:  
Plaintiffs, : 11-CV-01279 (AJP)  
:  
v. : 500 Pearl Street  
:  
PUBLICIS GROUPE, *et al.*, : New York, New York  
:  
Defendants. : January 18, 2012  
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TRANSCRIPT OF CIVIL CAUSE FOR  
TELEPHONIC STATUS CONFERENCE  
BEFORE THE HONORABLE ANDREW L. CARTER, JR.  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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1 THE CLERK: Civil cause for a telephone status  
2 conference in case number 11-CV-1279, Moore, et al., v.  
3 Publicis Groupe, et al.

4 Counsel, please state your appearance. For the  
5 plaintiff?

6 MS. WIPPER: This is Janette Wipper for the  
7 plaintiff.

8 MS. BAINS: Deepika Bains for the plaintiff.

9 THE CLERK: And for the defendant.

10 MR. BRECHER: This is Jeffrey Brecher, Jackson  
11 Lewis, for defendant MSL Group.

12 THE COURT: All right. Good afternoon. All right.  
13 I've seen each side's proposed stipulations. I have a couple  
14 of questions. In plaintiffs' proposed stipulation number 6,  
15 plaintiffs indicate that they "shall not introduce or  
16 otherwise rely on or refer to any evidence relating to any  
17 physical symptoms related to a medical or mental health  
18 diagnosis," et cetera. And then in plaintiffs' proposed 7 you  
19 have a list of conditions or states of being that you feel  
20 that the plaintiffs would be able to testify about including  
21 toward the middle of that "headaches, hives, and welts." You  
22 go on to mention "clammy in legs and stomach cramps."

23 Let me hear from plaintiffs as to why headaches or  
24 hives and welts, just to take those first three in that little  
25 area, would not be physical symptoms related to a medical or

1 mental health diagnosis or diagnosed conditions.

2 MS. WIPPER: Well, as an initial matter, Your Honor,  
3 the plaintiff has not sought treatment from a therapist at all  
4 and has not sought any treatment from a medical doctor related  
5 to their work-related issues. So the cases that we've cited  
6 and that we pulled this language from are similar to the case  
7 we have here where plaintiffs have no medical information,  
8 treatment related to their claim and so the language that  
9 we've proposed has been pulled out of case law in the Second  
10 Circuit both from the Second Circuit and from District Court  
11 cases. So with respect to headaches that comes from Patterson  
12 v. Lasomago [Ph.] where the Second Circuit upheld a jury award  
13 for garden variety damages, \$100,000.00 based on testimony  
14 concerning sleeplessness, headaches, and stomach pains, as  
15 well as humiliation and loss of self-confidence.

16 So all of the language that we put in paragraph 7  
17 comes from case law related to garden variety claims where no  
18 medical evidence was at issue because the plaintiffs did not  
19 seek any type of medical assistance for their claim.

20 THE COURT: Okay. But those cases were cases in  
21 which the Second Circuit was reviewing, I believe, the  
22 District Court's discretion in reducing jury amounts. Is that  
23 correct?

24 MS. WIPPER: Yes, Your Honor.

25 THE COURT: And that's a situation in which the

1 plaintiffs testified as to whatever they had and the District  
2 Court reduced the damages to garden variety damages and the  
3 Second Circuit held that the District Court did not abuse its  
4 discretion, correct?

5 MS. WIPPER: Yes, Your Honor.

6 THE COURT: Okay. That seems slightly different  
7 than a situation here in which we're trying to -- in which the  
8 plaintiffs are not waiving the privilege regarding the mental  
9 health records, and that's pretty clear, but there's also this  
10 issue of medical records. And I guess plaintiffs -- are  
11 plaintiffs now saying that none of the plaintiffs that would  
12 be covered by the stipulation have sought any medical  
13 treatment, period, or just the claim that the medical  
14 treatment that plaintiffs may have sought is not related to  
15 the alleged discrimination?

16 MS. WIPPER: Well, all of the plaintiffs have seen a  
17 doctor in their life and the defendants have asked for  
18 information concerning all medical doctors that they have seen  
19 within the last ten years regardless of whether it had  
20 anything to do with work or work-related stress. So our  
21 position is not that they haven't seen a medical doctor; our  
22 position is that they haven't seen a medical doctor related to  
23 anything concerning the claim. The exception is the one  
24 plaintiff that we mentioned on the previous conference calls  
25 with Your Honor, Carol Perlman [Ph.], [indiscernible]

1 plaintiff under the Equal Pay Act, which is I think a law that  
2 does not provide for compensatory damages as a remedy, so her  
3 compensatory damages are really irrelevant to this discussion.  
4 She would be an asset class member and not subject to  
5 discovery under the Federal Rules of Civil Procedure absent  
6 extraordinary circumstances, so her issue is really -- her  
7 medical records, in our opinion, are irrelevant. And she is  
8 the only plaintiff that we're aware of, and we've confirmed  
9 with the plaintiff, has not any sort of medical treatment from  
10 a general doctor that has any relationship whatsoever to what  
11 they experienced at work.

12 THE COURT: Okay. Because here's what my concern  
13 is. Obviously the plaintiffs can certainly testify about  
14 humiliation, anger, frustration, things of that sort. When we  
15 start getting into the realm of headaches, hives, and welts,  
16 it seems that it's a little unfair for the plaintiffs to be  
17 able to testify that they were so stressed that they had hives  
18 and welts or headaches or things of that nature if, in fact,  
19 there are medical records that the defendants would not have  
20 that would indicate that perhaps the plaintiffs' headaches  
21 were caused by some other medical condition. What's  
22 plaintiffs' position on that?

23 MS. WIPPER: Well, our position on this matter is  
24 that we just didn't want to limit the plaintiffs beyond what  
25 the case law has allowed for garden variety claims. We're not

1 proposing that necessarily any of these plaintiffs are going  
2 to be talking about hives or welts. We just did not want to  
3 enter into any stipulation that would limit our plaintiffs  
4 from testifying to what they're already are entitled to  
5 testify to under the case law and the circuit.

6 THE COURT: Okay. But, again, those cases that you  
7 cited, it's your reading of those cases -- again, my reading  
8 of those cases, again, it's a different -- those cases are in  
9 a different state and it was a different state of a litigation  
10 at that point. Do you have at this point information that the  
11 plaintiffs that would be covered by this stipulation intend to  
12 testify about physical manifestations of their garden variety  
13 emotional stress?

14 MS. WIPPER: Yeah. As far as we know, the  
15 plaintiffs have not sought -- have not had any kind of  
16 physical manifestation, have not sought treatment from a  
17 medical doctor concerning anything related to work. Our  
18 concern is that defendants' requests for medical records go  
19 way beyond that. They've asked for information about any  
20 therapist any plaintiff have seen in their lifetime. The  
21 plaintiffs haven't seen therapists but, you know, that request  
22 is out there.

23 They've also asked for all the information from any  
24 medical doctor they have seen within the last ten years. At  
25 the deposition of Kate Wilkerson when I asked defense counsel

1 Jeff Brecher, who's on the phone, if he would limit his  
2 questioning to medical records concerning the claims and work-  
3 related stress he refused. So our concern is that the  
4 requests and the information they're seeking go well beyond  
5 what's relevant to this case in addition to the privilege  
6 issue on privilege communication between a psychotherapist and  
7 patient.

8 THE COURT: Okay. But let's focus on not the  
9 psychotherapist privilege; let's focus on the medical records  
10 that would not be subject to a privilege. The medical records  
11 regarding physical ailments, I guess is what I'd like to focus  
12 on.

13 Let me hear from defendants on that.

14 MR. BRECHER: Thank you, Your Honor. You know, I  
15 thought at the last conference that we had last week that we  
16 were all on the same page pretty much and that we were going  
17 to be able to work out an agreement. We had a meet-and-confer  
18 on Friday after the patient -- one of the plaintiffs'  
19 depositions and I thought we had taken one or two steps  
20 forward, but then later or earlier this week I think we took  
21 three steps backwards. And I think you hit all the points and  
22 all the issues that we've had problems with and I think you  
23 get a sense of why Judge Peck issued the order that he did is  
24 that they're in and they're out. They can't seem to make up  
25 their mind as to whether they want to assert a claim or not

1 assert a claim.

2           If they're going to assert a claim for any kind of  
3 emotional stress, injury that runs -- that could be beyond  
4 garden variety and I believe the statements set forth in  
5 paragraph 7 go beyond garden variety under the case law, then  
6 they have to disclose the records. If they're going to take  
7 the position that they're only seeking garden variety damages  
8 and limit it to what those truly are, then that's a different  
9 story, but you can't have it both ways. And I think that's  
10 what Sims says with respect to sort of the fairness standard.  
11 And it's unfair to a defendant to have a plaintiff testify at  
12 trial, oh, I had -- you're admitting and I have weakness in my  
13 legs and stomach cramps and it's all because of defendant,  
14 where there may be medical records that explain that that's a  
15 result of some other condition.

16           And so all we're seeking here is fairness. And I  
17 think it's -- I think the cases are clear that what garden  
18 variety is and is not and it's certainly a physical  
19 manifestation. And the symptoms are non-garden variety and  
20 you're correct that the cases that they cite are in a  
21 completely different context and they have not cited a single  
22 case involving the waiver of the physician -- or I'm sorry,  
23 the psychotherapist [indiscernible] privilege of working with  
24 medical records.

25           All of the cases that you have cited involve a



1 question of remitter after a jury trial or a default judgment  
2 and the Court is now trying to figure out, well, do these look  
3 like kind of garden variety damages in which case I'll give  
4 you X or are these more significant in which case of the case  
5 cited I can give you Y. It's not a discussion in any of those  
6 cases about the privilege, so I think you're correct that all  
7 those cases are in a different context and are not applicable  
8 here.

9           So the language that they've took from those cases  
10 and injected into the stipulation should not be here and I  
11 would ask the Court to so order our stipulation. I think  
12 we're all in agreement -- or I think we all have a pretty good  
13 understanding of what is and what is not garden variety. And  
14 I think that paragraph says it over this tremendously and  
15 that's why we're unable to submit joint stipulations.

16           THE COURT: Okay.

17           MS. WIPPER: Your Honor, if I may respond.

18           THE COURT: Sure.

19           MS. WIPPER: The issue is really not about the  
20 waiver and the psychotherapist privilege because as I  
21 previously stated, none of the plaintiffs has gotten treatment  
22 from a therapist. The issue is really about medical records  
23 and the medical records that they are seeking and whether or  
24 not they're going to as a result of testimony in a deposition  
25 then try to seek, you know, all medical records going back ten

1 years from any doctor that any plaintiff had ever seen, even  
2 though they had never seen any doctor related to anything for  
3 any work-related stress.

4           So what I would represent to the Court is that there  
5 are no medical records that are relevant to this case because  
6 as far as we know and we, you know, confirmed it with all of  
7 our plaintiffs and they have never seen a doctor with the  
8 exception of Carol Perlman concerning anything related to  
9 their claim. So our position is that the records are  
10 irrelevant.

11           And insofar as the Court is concerned that the  
12 language in number 7 exceeds garden variety or will create  
13 more disputes and not be able to resolve this issue with a  
14 stipulation, we would be willing to modify the language in  
15 number 7. You know, we just thought taking the language from  
16 the cases would be clearest way of making the stipulation  
17 consistent with Second Circuit law.

18           THE COURT: Okay. Because, again, I think --

19           MR. BRECHER: Judge, obviously it's our position  
20 it's inconsistent with the Second Circuit law.

21           THE COURT: Well, I think the parties are -- I think  
22 the plaintiff is correct in that I don't think the issue here  
23 is -- I think the parties keep conflating mental health  
24 treatment with other medical treatment and I guess maybe  
25 that's where all the confusion comes in on my part and the

1 parties' part as well. Clearly there's a psychotherapist  
2 privilege. Clearly that has not been waived at this point.  
3 Regarding garden variety emotional stress, again, that's  
4 dealing with those emotional issues, those garden variety  
5 emotional issues. Now here's where it gets confusing.

6           Again, obviously the plaintiffs can talk about being  
7 frustrated, humiliated, those sorts of things. The  
8 plaintiffs' position, if I'm understanding this, is that,  
9 again, it's not a matter of privilege; it's a matter of  
10 relevance, that the medical records -- the medical records --  
11 in this case since no one has really sought mental health  
12 treatment, the medical records here are not dealing with  
13 mental health treatment. The medical records for more  
14 physical ailments are not relevant because the plaintiffs have  
15 not sought treatment for physical ailments that have resulted  
16 from the discrimination. Is that the plaintiffs' position?

17           MS. WIPPER: Yes, Your Honor.

18           THE COURT: Okay. And the --

19           MR. BRECHER: My position, Judge, would be if they  
20 haven't sought treatment for any physical ailment resulting  
21 from any alleged discrimination there should be no testimony  
22 of --

23           THE COURT: Well --

24           MR. BRECHER: -- stating that they've suffered any  
25 physical symptoms and if there's no testimony that they

1 suffered any physical symptoms, then we don't need the  
2 records. That's -- you know, and it's resolved if that's  
3 their representation. As long as people don't get up on the  
4 stand and testify, "I have welts" --

5 THE COURT: Right.

6 MR. BRECHER: -- "and weakness in my legs and  
7 stomach cramps and sleeplessness" and, you know --

8 THE COURT: Yes, because, again, I think that the  
9 concern that I have is from defendants' perspective. Even  
10 though the plaintiffs are claiming that they haven't sought  
11 any physical -- any medical treatment for any ailments  
12 suffered as a result of discrimination, if the plaintiffs  
13 start testifying about physical ailments, if they start  
14 testifying that they have -- that a plaintiff has headaches  
15 and they didn't seek treatment perhaps for those headaches as  
16 a result of the discrimination but, for example, the  
17 plaintiff -- again, hypothetically speaking -- has a long  
18 history of high blood pressure which is causing headaches for  
19 that plaintiff for the past several years, that's something  
20 that defendants would be entitled to have and that under  
21 plaintiffs' version of how the way things should work would  
22 not be entitled to. Is that correct from plaintiffs'  
23 perspective?

24 MS. WIPPER: Well, it's --

25 THE COURT: I mean, because it's not -- the

1 defendants shouldn't be hamstrung into only -- if the  
2 plaintiffs are going to talk about physical manifestations of  
3 their emotional stress -- of their garden variety emotional  
4 stress, the defendant should be allowed to probe as to whether  
5 or not there are other physical conditions that have caused  
6 those physical manifestations that would be present in medical  
7 records.

8           So, for example, and what you've listed here if a  
9 plaintiff says that "I was stressed as a result of this and I  
10 broke out in hives," it certainly would be relevant that there  
11 were medical records indicating that the plaintiff has a  
12 history of breaking out in hives or some condition that causes  
13 the plaintiff to break out in hives. Wouldn't agree? Counsel  
14 for plaintiffs?

15           MS. WIPPER: Your Honor, well, there is case law  
16 that says that there's a garden variety claim. It's not  
17 necessarily that every physical manifestation would be  
18 relevant because the medical issues are not at issue in the  
19 case and the plaintiff is not relying on any type of medical  
20 evidence to corroborate their claim. So I understand with the  
21 example of hives, but if someone had a headache I don't  
22 necessarily believe that they would see a doctor concerning,  
23 you know, a headache. If it was extensive and they had  
24 headaches for months or years, that would be a different  
25 issue. But notwithstanding that discussion, our position is

1 our plaintiffs haven't had any physical manifestations  
2 concerning the claim.

3 THE COURT: Okay.

4 MS. WIPPER: So I don't believe that it's going to  
5 be an issue that comes up. Last week when we had the  
6 deposition, the defense counsel was questioning the plaintiff  
7 about symptoms, physical symptoms, about medical treatment  
8 pushing them really to testify about something like this. So  
9 we're just trying to resolve the issue, not limit the  
10 plaintiffs' testimony to the extent it would be inconsistent  
11 with what they have a right to testify about under the case  
12 law. And we understand that, you know, with respect to  
13 physical ailments that would rise to the level of hives or  
14 something, you know, serious like longstanding headaches, that  
15 would be beyond the scope of stipulation and the garden  
16 variety claims that they're alleging. That's not something  
17 that they're going to be testifying about.

18 But if we're going to be limited -- plaintiffs are  
19 going to be limited, I also would propose that defense is  
20 limited in that they don't invite certain types of testimony  
21 and confuse the issue, which is what happened last week.

22 THE COURT: Okay. Let me hear from defendants.

23 MR. BRECHER: I don't think we invited any  
24 responses, you know, sought to -- or attempted to make them  
25 waive any kind of privilege. It -- I think the issue is

1 relatively simple, which is if they want to withdraw the claim  
2 for damages related to any kind of physical manifestation,  
3 then they have to provide records that might demonstrate some  
4 other cause. What I'm hearing from plaintiffs' counsel is  
5 that there is no -- there is not going to be any testimony  
6 regarding any physical manifestations and that the items that  
7 are listed in paragraph 7 are really just possibilities that  
8 they, you know, as I say, plucked from cases and that they had  
9 no intention of testifying to any of this, in which case I  
10 think it should be -- you know, we could resolve the issue by  
11 just saying plaintiffs have no physical manifestations as a  
12 result of any alleged discrimination and aren't going to  
13 testify to such. And to me that would resolve the issue on  
14 the medical records.

15 As to the psychotherapist records, again, if they  
16 limit their testimony to garden variety, which is "I'm upset.  
17 I was angry. I was embarrassed. I" -- you know, those kinds  
18 of phrases, then there would be no waiver if they took the  
19 finding "We're suffering from depression or anxiety." I  
20 believe that that is a waiver under Sims.

21 THE COURT: Okay. Well, again, we'll get to that a  
22 little bit later, but let's just see if we can clarify this a  
23 little bit more once and for all. So plaintiffs at this point  
24 with the plaintiffs who are covered by this proposed  
25 stipulation right now do not have any physical manifestations

1 of their garden variety emotional stress that they wish to  
2 testify about. Is that correct?

3 MS. WIPPER: With the exception of Carol Perlman,  
4 which I mentioned earlier, who has claims under the Equal Pay  
5 Act.

6 THE COURT: Correct.

7 MS. WIPPER: Which does not cover her. Again, that  
8 is correct.

9 THE COURT: Okay.

10 MS. WIPPER: If I can add one comment in response to  
11 defense counsel's. In terms of limiting it to physical  
12 manifestations, what we would propose is limiting any kind of  
13 testimony to what's consistent with the case law and not  
14 necessarily picking and choosing between certain terms. I  
15 think we're in agreement that depressed [ph.] is that any  
16 healthy, well-adjusted person may reasonably feel as a result  
17 of experiencing discrimination is the operable standard, so we  
18 would propose that that would be the standard in the  
19 stipulation.

20 THE COURT: What --

21 MR. BRECHER: Judge, this is the problem.

22 THE COURT: All right.

23 MR. BRECHER: So they don't want to put in anything  
24 specific. They just want to put in whatever is consistent  
25 with the case law, but as you can see we can't even agree on



1 what's consistent with the case law. They have this paragraph  
2 7 which they think is all consistent with Second Circuit case  
3 law and I think the Court recognizes that it's not. The cases  
4 that they've cited are -- don't deal with this issue at all.

5 THE COURT: Okay.

6 MR. BRECHER: So --

7 MS. WIPPER: But the --

8 MR. BRECHER: I don't like to leave it in that kind  
9 of indeterminate space.

10 THE COURT: Okay. I mean, again, I think the cases  
11 do touch upon that and, again, I think what makes this a  
12 little bit difficult is when we keep talking about garden  
13 variety, emotional distress, and defendants keep stating, and  
14 it is true, that if the plaintiffs start going beyond garden  
15 variety emotional distress and put mental health at issue, it  
16 could waive the psychotherapist privilege, but the plaintiffs  
17 have indicated that's really irrelevant to this case in any  
18 event.

19 I don't think that -- I don't know if we need to  
20 come with an exhaustive list of things, but I do think that,  
21 again, the physical manifestations create a problem for the  
22 medical issues. I think if a plaintiff were to testify that  
23 she were stressed out and had headaches that doesn't waive the  
24 psychotherapist privilege, but it certainly puts at issue and  
25 makes more relevant potentially the medical records, but that

1 wouldn't waive the psychotherapist privilege for a plaintiff  
2 to say that "I was stressed out and I -- and because I was  
3 stressed, I had headaches." But, again, I think that we're  
4 all kind of -- the cases kind of use a lot of these terms  
5 sometimes interchangeably and because of that it's easy to  
6 start conflating these terms.

7           But let's just focus again on the medical records  
8 because I don't think that there's anything that's been listed  
9 here in what the plaintiffs have proposed that would waive the  
10 psychotherapist privilege, which again is, I suppose, just  
11 irrelevant in this case from what plaintiffs are saying  
12 because no one has sought -- well, I don't know if that's true  
13 or not but there's certainly -- it's -- the plaintiffs, I  
14 think, have indicated that no one has sought any sort of  
15 mental health treatment as result of the alleged  
16 discrimination. Is that correct?

17           MS. WIPPER: Yes, Your Honor.

18           THE COURT: Okay. So then let's just deal again  
19 with the physical manifestations. I don't want to decide on  
20 issues that aren't really ripe for decision. If it really is  
21 the case that at this point -- and, again, what we're dealing  
22 with is the plaintiffs that are known at this time that we're  
23 dealing with the stipulation. I'm not sure if we're just  
24 making things more complicated sometimes here, but let me get  
25 a sense again.

1 I think we discussed last time I think we don't want  
2 to put anything in there about the plaintiffs having some sort  
3 of malapropism and saying, "I felt depressed" or "I felt  
4 anxious" or something like that and that opening up the door,  
5 waiving anything in terms of any sort of privilege issues, so  
6 I don't think that that's appropriate, but let's just go one  
7 by one down the stipulation here.

8 And let me just find out, again, from plaintiffs'  
9 perspective. There's on plaintiff that you mentioned thus far  
10 who's under the Equal Pay Act who had medical treatment as a  
11 result of the alleged discrimination. Is that correct?

12 MS. WIPPER: Yes, that's correct.

13 THE COURT: Okay.

14 MS. WIPPER: It was as a result of work stress,  
15 so -- which was related to the discrimination.

16 THE COURT: Okay. All right. Let's move on --  
17 let's go to -- let's go one by one down the stipulation. In  
18 terms of --

19 MR. BRECHER: Which one?

20 THE COURT: We're going to go -- we're going to look  
21 at them side by side. In terms of the first one, paragraph 1,  
22 we're going to go with the defendants' stipulation because,  
23 again, I think that this staying consistent with Second  
24 Circuit law is just going to be a little amorphous and the  
25 parties will continue to have disputes about this.

1           Number 2 and number 3 appear to be the same. Is  
2 that correct?

3           MS. WIPPER: Yes, Your Honor.

4           THE COURT: Okay.

5           MR. BRECHER: Yes, Your Honor.

6           THE COURT: Number 4. All right. Let me hear from  
7 the plaintiffs on 4. Why do you believe the plaintiffs'  
8 spouse/significant other/other people should be allowed to  
9 testify about this?

10           MS. WIPPER: Well, our reading of the cases is that  
11 it is generally that the plaintiff testifies only about garden  
12 variety, but that there is no absolute rule that there could  
13 be no other fact witness that testified and there are cases  
14 where a spouse for another fact witness testifies concerning  
15 emotional stress damages. We would propose that this issue is  
16 premature to be dealt with at a stipulation stage and maybe  
17 should be dealt with a motion in limine at trial. So, you  
18 know, in the first instance we think it limits us beyond what  
19 the case allows and secondly, we believe it's premature to  
20 address in the stipulation.

21           THE COURT: All right. What is defendants' position  
22 on 4?

23           MR. BRECHER: Judge, our position is that the case  
24 law pretty clearly states that it's limited to the plaintiffs'  
25 testimony. I think we cited two cases. One deals with

1 specifically the question of waiver and it's the  
2 [indiscernible] versus Quest Diagnostics case, which is the  
3 Eastern District of New York 2011 July. And then I'd point  
4 you to the Mayer [Ph.] case, which is an EDNY case of 2010,  
5 which described the plaintiff's damages are significant  
6 [indiscernible] based on the testimony of additional witnesses  
7 and the garden variety is limited to the testimony of the  
8 plaintiff only.

9           And here again, Judge, it's a question of fairness.  
10 You know, if you're going to have three people come and  
11 testify about how emotionally distraught someone was then  
12 we're -- you know, then we're, you know, getting back to the  
13 problem of waiving the privilege and also on the issue of the  
14 medical records. And if it's truly garden variety and what  
15 the cases talk about is what we had been talking about in both  
16 conferences, "I was upset, I was hurt," et cetera, then it  
17 would seem unnecessary, number one; and then, number two,  
18 unfair to defendant to have three or four people come and  
19 testify to that because it makes it sound more significant.  
20 So I'd probably be interested in the stipulation, not to be  
21 disputed, you know, years from now.

22           MS. WIPPER: Plaintiffs' position would be that it's  
23 not -- the testimony of the fact witness is limited to the  
24 same subject matter that the plaintiffs' testimony would be  
25 would not waive the privilege. I believe that, you know,

1 defendants are just trying to limit all possibilities on  
2 plaintiffs' ability to prove their case and they want to  
3 minimize any impact as much as they can prematurely to  
4 preclude us from proving damages, compensatory damages,  
5 punitive damages or whatever else is at issue at trial. At  
6 this point of the stipulation it seeks prematurely to decide  
7 who's going to testify and who's not at a trial.

8 THE COURT: And at this point do plaintiffs believe  
9 that plaintiffs have other family members, significant others  
10 that would be testifying or able to testify about these  
11 issues?

12 MS. WIPPER: Well, defendants served interrogatory  
13 requests asking specifically about family members and who  
14 plaintiffs had talked to about the discrimination to test  
15 whether or not plaintiffs at the time that the discrimination  
16 was occurring had actually talked to someone about what they  
17 were experiencing. So they had to have asked those questions  
18 in interrogatories as well in deposition. But they don't want  
19 us to be able to introduce any evidence [indiscernible].

20 MR. BRECHER: Judge, if I can respond to that, I  
21 don't think that's accurate. I think that certainly if a  
22 spouse were to testify regarding the conversation they had  
23 with their plaintiff about what happened to them at work that  
24 day, that's not testimony relating to emotional distress  
25 damages and I would have no objection to that. So I don't

1 think that's -- I think it's two different issues.

2 THE COURT: Okay. All right. Let's do this with 4.  
3 Let's hold off on 4 and we'll deal with that in a motion in  
4 limine and let's see where we are at that point. Again, this  
5 maybe something that's moot, but let's just take 4 out both  
6 sides and see where we are. We'll deal with that as a motion  
7 in limine as we go along with the case.

8 Number 5 appears to be the same for both sides. Is  
9 that correct?

10 MS. WIPPER: Yes.

11 THE COURT: All right. Number 6 and 7, which are  
12 very closely related. All right. In terms of number 6, both  
13 sides seem to be in agreement on that other than some terms  
14 that are thrown in there. In terms of the terms that should  
15 be used to "Both sides agree that plaintiffs shall not  
16 introduce or otherwise rely on or refer to any evidence  
17 relating to any physical symptoms or conditions experienced as  
18 a result of any alleged discrimination." And while I guess --  
19 no, I guess you don't agree because the plaintiffs are trying  
20 to limit that to "any medical or mental health diagnosis  
21 experienced as a result of any alleged discrimination."

22 Let us go with -- we're going to go with defendants  
23 on number 6. Then we'll take out the examples and we'll have  
24 to deal with these as we get closer to trial in terms of a  
25 motion in limine, but we can get rid of those examples. But I

1 think let's go with defendants. I don't think plaintiff  
2 should be relying on or referring to "any evidence relating to  
3 any physical symptoms or conditions experienced as a result of  
4 alleged discrimination" because, again, the issue there is  
5 that the plaintiffs start talking about these physical  
6 symptoms and these physical manifestations, the defendant  
7 should be allowed to probe as to whether or not there are  
8 underlying medical issues that may have caused those physical  
9 manifestations of those.

10 Now, again, I can't at this point come with an  
11 exhaustive list of things and a lot of that is going to have  
12 to dealt with in a motion in limine as we get closer to trial.  
13 Regarding 7, again, I think plaintiffs goes too far and I  
14 think defendants may be a little bit too limiting.

15 MR. BRECHER: Judge, I'd be willing, you know, to  
16 add a couple of their terms like "stress" -- I don't know what  
17 else is here.

18 THE COURT: Well, again, I don't want to get into  
19 just add -- going term by term --

20 MR. BRECHER: Right.

21 THE COURT: -- necessarily, but perhaps what we can  
22 do is, the defendants have "claims for emotional stress  
23 damages, will be limited to the testimony of each plaintiff on  
24 her own behalf to describe the negative emotions that any  
25 healthy, well-adjusted person may reasonably feel as a result



1 of experiencing alleged discrimination." Plaintiffs have the  
2 same thing except they use the word "distress" instead of  
3 emotions.

4 MS. WIPPER: Correct.

5 THE COURT: And, Your Honor, there's one other  
6 difference, if I may. They limited testimony just to the  
7 plaintiffs, so they've testimony of each plaintiff on her own  
8 behalf. And we don't have that as well as [indiscernible].

9 MR. BRECHER: That was in your original stipulation  
10 that you submitted to the Court, though.

11 MS. WIPPER: In addition to the other --

12 THE COURT: Okay. All right. All right. Okay.

13 MS. WIPPER: -- [indiscernible] and family members.

14 THE COURT: Okay. Let's just say at this point --  
15 let's just say, "The evidence plaintiffs may introduce or  
16 otherwise rely on or refer to at trial in support of their  
17 claims for emotional distress damages shall be limited to the  
18 testimony that describes the emotional distress that any  
19 healthy, well-adjusted person may reasonably feel as a result  
20 of experiencing alleged discrimination."

21 Now, again, that will be mod -- that's modified by  
22 paragraph 6. Again, not getting into physical symptoms of  
23 this emotional distress, "the physical manifestations of the  
24 emotional distress." And then I don't think we have to get  
25 into all the specific terms in particular. Again, some of

1 this will have to wait as we get closer to the trial to see.  
2 We'll have to see what the plaintiffs' proposed testimony  
3 would actually be.

4 All right. Let's go to --

5 MR. BRECHER: So, Judge, just on the -- you did want  
6 me to take out the examples into paragraph 7?

7 THE COURT: Yes. Yes. Take out all the examples in  
8 6 and in 7.

9 MR. BRECHER: Okay.

10 THE COURT: And then for -- let's go to plaintiffs'  
11 8. Okay. Here we come to another practical problem here.  
12 "Defendant shall not question plaintiffs through deposition or  
13 other discovery requests about medical or psychological  
14 diagnosis or diagnosed conditions of physical impairment or  
15 related medical evidence."

16 Here's where we come to some of the real issues here  
17 in this case. How many -- are the plaintiffs covered by the  
18 stipulation? Have all the plaintiffs been deposed yet?

19 MS. WIPPER: No, Your Honor.

20 THE COURT: Okay. Are the plaintiffs anticipating  
21 having their plaintiffs testify about their garden variety  
22 emotional distress at the deposition?

23 MS. WIPPER: Yes.

24 THE COURT: Okay.

25 MS. WIPPER: But nothing concerning physical issues

1 that we've discussed today.

2 THE COURT: Okay. And then -- and again -- all  
3 right, so it's going to simply be "I felt humiliated, I felt  
4 embarrassed," things of that nature?

5 MS. WIPPER: Yes, Your Honor.

6 THE COURT: Okay. Knowing that, what's the  
7 defendants' position on plaintiffs' proposed 8?

8 MR. BRECHER: I'm just re-reading it, Judge.

9 THE COURT: Sure.

10 MR. BRECHER: Maybe we should limit it to "Defendant  
11 shall not question plaintiffs at deposition or discovery  
12 requests about medical or psychological diagnosis," period.

13 THE COURT: But does that mean the defendants under  
14 that -- the defendants would still intend to question the  
15 plaintiffs about physical manifestations of their emotional  
16 distress?

17 MR. BRECHER: Well, I've been told by plaintiffs'  
18 counsel there are no physical manifestations, so there  
19 shouldn't be an issue as to what -- you know, if the question  
20 was posed the answer would be no, so as long as this  
21 stipulation -- as long as there's another paragraph in here  
22 that states that "all plaintiffs subject to the stipulation  
23 have no physical manifestations as a result of any alleged  
24 discrimination," then I think we're covered.

25 THE COURT: Well, I think paragraph 6 that we talked

1 about covers that, doesn't it? "The plaintiffs shall not  
2 introduce or otherwise rely on or refer to any evidence  
3 relating to any physical symptoms or conditions experienced as  
4 a result of any alleged discrimination" --

5 MR. BRECHER: Yes, you're right, Judge.

6 THE COURT: All right. So I think that covers it.

7 MR. BRECHER: I think that should cover it.

8 THE COURT: All right. So I think 8 is fine because  
9 I think that covers that. Plaintiffs' 9, defendants have any  
10 objection to that?

11 MR. BRECHER: I think if we deal with it there was  
12 some disclosure where plaintiff had waived the emotional  
13 distress damages to the class, but I can assume that is not  
14 being done now.

15 MS. WIPPER: No. That's not something we would be  
16 able to do until the class -- if and when the class would be  
17 certified because we are not assigned counsel representing all  
18 five members until the case is -- class is certified. So we  
19 don't --

20 MR. BRECHER: Which is why it surprised me when I  
21 saw it, so I have no objection to this, Judge.

22 THE COURT: Okay. That's fine. And then let's go  
23 back to -- I think what's left is defendants' 8. Again, we'll  
24 scrap that. Again, I don't want to get into if a plaintiff  
25 accidentally --

1 MR. BRECHER: Judge, one thing about this if the --  
2 I want to make clear that there'll be no testimony that  
3 anybody suffered from depression or anxiety.

4 THE COURT: Right.

5 MR. BRECHER: And I am concerned about testimony  
6 where someone says, "I feel depressed and anxious."

7 THE COURT: No, no. I understand that and I think  
8 that that's something that the plaintiffs should warn the  
9 plaintiffs about. Again, my concern is that the word  
10 "depressed" and "anxious," those words have become such a part  
11 of common vernacular that someone might accidentally state  
12 that. And, again, we can deal with that at the time.  
13 Obviously the parties can seek -- the defendants can seek a  
14 curative instruction. It depends on what's happening at the  
15 time of the trial. Sometimes you may not want a curative  
16 instruction because it may draw more attention to it.

17 But I think that's something we can certainly take  
18 up as we get closer to trial in terms of what instructions  
19 plaintiffs should be given, but I think that "depressed" or  
20 "anxious," those words are a little bit too vague. I don't  
21 think there's any problem. I'm sure plaintiffs don't object  
22 to telling the witnesses that but, again, I'd be concerned  
23 about the witnesses making a mistake and saying something like  
24 that in a general sense. Obviously, the plaintiff should not  
25 be talking about clinical depression or an anxiety disorder or

1 anything of that nature, but I think 8 goes a little bit too  
2 far, so we'll scratch defendants' 8. And that should cover  
3 it.

4 So let's have the parties work on that with my  
5 revisions and send the revised stipulation to me. Email that  
6 to me by -- to my chambers, email by Friday.

7 MS. WIPPER: Okay, Your Honor.

8 THE COURT: All right.

9 MR. BRECHER: Thank you, Your Honor.

10 THE COURT: Okay.

11 MS. BAINS: Your Honor, this is Deepika Bains for  
12 the plaintiffs. I just wanted to clarify one point.

13 THE COURT: Okay.

14 MS. BAINS: So paragraph 7, I heard you read off  
15 your language and another difference that I don't think was  
16 pointed out yet between the proposal was that defendants had  
17 "negative emotions" --

18 THE COURT: Right.

19 MS. BAINS: -- whereas plaintiffs had "distress" and  
20 I believe Your Honor gave a -- that it would be emotional  
21 distress.

22 THE COURT: That's correct.

23 MS. BAINS: But when defense counsel clarified he  
24 said the only change would be the list, so I just wanted to  
25 clarify that that was also an additional change.

1 THE COURT: Yes, that's a change.

2 MR. BRECHER: Yes, Judge. I understood, you know.

3 THE COURT: Okay.

4 MR. BRECHER: I understood you said "emotional  
5 distress."

6 THE COURT: Okay. All right. Thank you. Anything  
7 else from plaintiffs?

8 MS. WIPPER: No, Your Honor.

9 THE COURT: Anything else from defendants?

10 MR. BRECHER: Judge, I'm just curious. Was there a  
11 court reporter on this or no?

12 THE COURT: We have a -- it's being recorded  
13 electronically.

14 MR. BRECHER: Okay. Thank you.

15 THE COURT: Okay. All right. Thank you.

16 MR. BRECHER: Okay. Thank you, Judge.

17 THE COURT: Okay. Bye.

18 MS. WIPPER: Thank you.

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1 I certify that the foregoing is a court transcript  
2 from an electronic sound recording of the proceedings in the  
3 above-entitled matter.

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7 Ruth Ann Hager, C.E.T.\*\*D

8 Dated: February 1, 2012  
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